NO. 92-1126

Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GEORGIA GOODIN, Petitioner

V.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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26 pp

QUESTION PRESENTED

What is the proper definition of "prevailing party" under the Equal Access to Justice Act?

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OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Appellant petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is published, but is also attached hereto as Appendix A. The Order denying Petition Rehearing is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered October 9, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant provisions of 28 U.S.C.A. § 2412 are set forth in Appendix C.

STATEMENT

This case concerns 28 U.S.C.A. § 2412, which involves attorney's fees and costs under the Equal Access to Justice Act. The history of this case is lengthy and complex. On 4/26/76 the claimant applied for disability insurance benefits (DIB). She last met the insured status requirements on 9/30/73. The claim was denied by SSA both initially and on reconsideration. After a hearing, the ALJ determined on 5/31/77 that claimant was not disabled at any time prior to the expiration of her insured status. Claimant then filed an action in the U. S. District Court, and when the Secretary's decision was upheld, appealed to the U. S.

Court of Appeals, which affirmed the District Court on 9/2/80.

Claimant filed another application for DIB benefits on 9/25/80. This claim was appealed through the reconsideration level, and on 3/11/81, the ALJ dismissed the claim as res judicata as to the existence of a disability on or before the date her insured status expired, which was 9/70/73.

On 5/5/87, claimant filed another claim for DIB benefits, after the discovery and surgical removal of a brain tumor determined to be in existence prior to or at the time the claimant's insured status expired. On 6/9/87, the claimant was denied by SSA initially, and denied upon reconsideration on 7/29/87. Claimant requested a hearing before an ALJ, which was held on 11/5/87. However on 2/24/88, the ALJ issued an order dismissing the hearing request based on res judicata, concluding that the material facts

presented in the 1987 claim were the same as those presented in the initial claim, and that the prior decision could not be reopened.

On 2/26/88, the claimant requested a review of the Order of Dismissal, which was denied by the Appeals Council on 5/11/88. On 7/8/88, claimant commenced a civil action in District Court. On 11/18/88, the District Court determined that it had no jurisdiction to review the Secretary's decision not to reopen the earlier application, because the Court did not believe the Secretary had made its materiality and relevancy determinations after reconsidering the prior application "on the merits."

On 3/16/88, claimant filed another application for DIB benefits, alleging disability since 1970. SSA denied the claim initially and upon reconsideration. Claimant requested a hearing, and on 7/31/89 the ALJ issued a Notice of

Dismissal based on res judicata, once again. Claimant requested that the Appeals Council review the ALJ's decision, and on 1/29/90 the Appeals Council issued a decision remanding the case back to the Law Judge for Further proceedings due to new and material facts which precluded application of res judicata.

A supplemental hearing was held on 5/17/90, but the case was once again denied by the ALJ on 7/30/90 who concluded that claimant was not entitled to benefits based on her 5/5/87 application. Claimant appealed, and the Appeals Council reversed the ALJ and awarded benefits to the claimant based on her 5/5/87 application, finding that claimant had been disabled since 1970.

On 6/19/91 claimant moved the District Court to dismiss the civil action, and on 6/24/91 the Court granted claimant's motion to dismiss, after which claimant filed her motion for EAJA fees

(AP 97-128). The District Court awarded EAJA fees and costs on 9/9/91. After the Secretary filed a Motion to Alter Order on 9/23/91, the District Court, albeit reluctantly, withdrew its award of EAJA fees.

Claimant appealed the District Court's final order withdrawing EAJA fees to the Eighth Circuit Court of Appeals. On 10/9/92 the Eighth Circuit denied claimant's motion for EAJA fees stating that claimant was not a "prevailing party" under the status. The claimant requested a rehearing, but her petition for rehearing was denied. This appeal followed.

REASONS FOR GRANTING THE PETITION

The question as to whether Ms. Goodin is entitled to an award of attorney's fees and costs under the EAJA turns on whether Mr. Millbrook can be considered "a prevailing party" under the EAJA.

The Courts which have decided this

The Courts which have decided this issue have held that a claimant becomes a "prevailing party" when an affirmative decision is made that she is entitled to the benefits she seeks. Rollins v. Sullivan, 784 F. Supp. 253 (E.D. Pa. 1991); Brown v. Secretary of Health and Human Services, 747 F. 2d 878 (3d Cir. 1984); McGill v. Secretary of Health and Human Services, 712 F. 2d 28 (2d Cir. 1983); Green v. Bowen, 877 F. 2d 204 (2d Cir. 1989); Texas State Teacher Association v. Garland Independent School District, 109 S. Ct. 1486 (1989); Swedberg v. Bowen, 804 F. 2d 432 (8th Cir. 1986).

Ms. Goodin's status as a "prevailing party" is not dependent on an affirmative court decision. Rather, the key factor is that the she ultimately received the benefits she sought for the period of time originally appealed to the Court in Millbrook v. Heckler, 780 F. 2d 1371 (8th Cir. 1986).

In Green v. Bowen, 877 F. 2d 204 (2d Cir. 1989), the Second Circuit Court of Appeals "[found] nothing in the EAJA that requires that a party prevail in a civil action reviewing a final agency determination." Citing the United States Supreme Court's decision in Texas State Teachers Association v. Garland Independent School District, 109 S. Ct. 1486 (1989), the Second Circuit concluded that if the claimant succeeded on a significant issue in litigation and achieved some of the benefit he sought in bringing suit, he was entitled to an award under the EAJA.

The Eighth Circuit determined that Ms. Goodin had not attained "prevailing party" status. But, if a claimant achieves success on a significant issue, either in or out of Court, then she is a prevailing party so long as this success was not completely unrelated to the litigation.

The only occasions where attorney's fees have not been granted have been when the claimant's only success is on a claim not originally sought in the litigation, Swedberg v. Bowen, 804 F. 2d 432 (8th Cir. 1986), or when success resulted solely from an independent change in law such that the claimant would have received the requested benefits even if suit had never been filed. Solely v. Bowen, 873 F. 2d 1153 (8th Cir. 1989).

In the case at hand, the ultimate success of the claim was directly related to the litigation. Ms. Goodin ultimately prevailed on the exact issue pursued through the litigation. The Social Security Administration ultimately reversed their previous denials of the claim filed by Ms. Goodin and allowed her to prevail on all issues.

The purpose of the EAJA is to encourage government agencies to act in an equitable manner and not to unreasonably

create the necessity for litigation. Brown v. Secretary of Health and Human Services, 747 F. 2d 878 at 880 (3d Cir. 1984), (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 reprinted in 1980 U.S. Code Cong. and Ad. News, 4953, 4991). This case supports the legal principal that attorney's fees be awarded to Ms. Goodin for prevailing on the issue of the whether she was disabled from 1973 through the present time.

In Texas State Teachers v. Garland Independent School District, 109 U.S. 1486, 1493 (1989), the U. S. Supreme Court stated:

> " . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under Hensley, not to the availability of a fee award vel non."

It is Ms. Goodin's overall success which should be viewed in this instance.

She was ultimately awarded all benefits which he sought, after nearly 20 years of litigation! She is a prevailing party for the purposes of an award of attorney's fees even though it was not the Court that made the award, but rather the administrative agency.

Here is the irony of this case: a party has a claim against an administrative agency; the claimant loses all the way through the Courts. Next, the claimant refiles alleging the original onset date, then the agency agrees with the claimant and awards benefits that the claimant sought in the initial claim.

But when the agency is requested to pay the costs and attorney's fees under the EAJA because the claimant was a prevailing party, the agency says: "No." We ask the Court to say: "Yes." Because to do otherwise would leave a "loophole" in the EAJA award system.

A case very similar to the instant case is Millbrook v. Heckler, 780 F. 2d 1371 (8th Cir. 1986). The U. S. Supreme Court recently denied a petition for writ of certiorari in the Millbrook case. Theodis Millbrook v. Louis W. Sullivan, Secretary of Health and Human Services, No. 92-369 (Aug. 25, 1992).

Another case on the same issue, but not exactly on point, is Decker v. Sullivan, (C.A. 8), No. 91-3340, September 29, 1992, where the claimant filed a second application and the two claims were consolidated--the EAJA and the second claim--and the ultimate consolidation of the two application proceedings did not provide a sufficient linkage to warrant an award of attorney fees for services rendered in both proceedings.

To avoid an inequitable result, George Goodin urges the Court to grant her Petition for a Writ of Certiorari so that there will be consistency among all

circuits as to the proper definition of "prevailing party" under the EAJA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

ORIGINAL SIGNED BY

Anthony W. Bartels

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December ~~November~~ 24, 1992.

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

NO. 92-1217	*	
	*	
Georgia Goodin	*	
	*	Appeal from the
Appellant,	*	United States
	*	District Court for
vs.	*	the Eastern
	*	District of
Secretary of Health	*	Arkansas
and Human Services,	*	
	*	[PUBLISHED]
Appellee	*	

Submitted: June 4, 1992
Filed: October 9, 1992

Before MCMILLIAN, WOLLMAN, and LOKEN, Circuit Judges.

PER CURIAM.

Georgia Goodin, a recipient of social security disability benefits, appeals the district court's[1] denial of her

1. The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas.

application for attorney's fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. We affirm.

In April 1978, Goodin filed her first application for disability insurance benefits alleging disability from March 1970. The Social Security Administration denied her application initially, on reconsideration and after a hearing. The Administrative Law Judge (ALJ) found Goodin was not disabled at any time prior to the September 30, 1973 expiration of her insured status. Goodin sought judicial review. The district court upheld the denial of benefits, and this court affirmed. Good v. Harris, no. 79-1933 (8th Cir. September 2, 1980) (unpublished per curiam).

In September 1980, Goodin filed her second application for benefits. The ALJ denied her claim on the ground of res judicata. In May 1987, after a brain tumor was discovered and surgically

removed, Goodin filed a third application. Goodin claimed that the tumor was in existence at the time her insured status expired. After exhausting her administrative appeals, Goodin again sought judicial review of the Secretary's refusal to reopen her claim. In November 1988, the district court granted the Secretary's motion to dismiss, concluding that it lacked subject matter jurisdiction. Goodin did not appeal the dismissal.

In March 1988, during the pendency of the district court proceedings on her third application, Goodin filed her fourth application for benefits. The Secretary denied her claim initially and on reconsideration. In July 1989, the ALJ denied her request for a hearing, again on the ground of res judicata. The ALJ concluded that, because more than four years had elapsed since the date of the initial determination on Goodin's first

application, the hearing decision could not be reopened, see 20 C.F.R. § 404.988 (1989), and that the new evidence was insufficient to constitute good cause to reopen, see 20 C.F.R. § 404.989 (1989). In January 1990, the Appeals Council remanded the case to the ALJ for further proceedings, concluding the new and material facts precluded the application of res judicata.

A different ALJ conducted a hearing and denied benefits on the basis of the May 1987 application. In May 1991, the Appeals Council reversed and awarded benefits from march 31, 1970. Although it does not appear that there was a pending case in the district court, Goodin then moved to dismiss the civil action on the basis of the Secretary's award of benefits, and the district court signed the order of dismissal on June 21, 1991.

On June 25, 1991, Goodin filed her EAJA application. The Secretary argued

that EAJA fees should be denied because Goodin was not a "prevailing party" in a "civil action" under 28 U.S.C. § 2412 (d) (1) (A), and her application was not filed within thirty days after the final judgment on November 18, 1988. In opposition, Goodin argued that she was a prevailing party because she successfully obtained an award of benefits.

The district court denied an award of EAJA fees, concluding that, even assuming Goodin was a prevailing party, the activity in federal court was not a "contributing factor" in bringing about the administrative action which ultimately resulted in an award of benefits. On appeal the parties reiterate their arguments to the district court.

This court reviews the denial of an EAJA award under an abuse-of-discretion standard. Gamber v. Bowen, 823 F. 2d 242, 244 (8th Cir. 1987). Under section 2412 (d) (1) (A), "[A] court shall award to a

prevailing party . . . fees and other expenses. . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action." Although Goodin ultimately prevailed in obtaining benefits, the district court's initial affirmance of the denial of benefits and its subsequent dismissal for lack of jurisdiction did not contribute to the agency's ultimate award of benefits. Goodin "obtained nothing more in the administrative proceedings than [s]he would have without" the federal court action. Rodabaugh v. Sullivan, 943 F. 2d 855, 858 n. 3 (8th Cir. 1991). Thus, Goodin was not a "prevailing party . . . in a civil action" under the statute.

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

NO. 92-1217EAJ	*	
	*	
Georgia Goodin	*	
	*	Order Denying
Appellant,	*	Petition for
	*	Rehearing and
vs.	*	Suggestion for
	*	Rehearing
Secretary of Health	*	En Banc
and Human Services,	*	
	*	
Appellee	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

November 16, 1992
Order Entered at the Direction of the Court:
/Michael E. Gans/
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX C

28 U.S.C.A. § 2412 provides:

"**§ 2412. Costs and fees**

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

. . . . "

(2)

NO. 92-1126

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GEORGIA GOODIN, Petitioner

V.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES,
Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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16 pp

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

GEORGIA GOODIN (SSN: 431-66-5184) — PLAINTIFF

V. NO. J-C-88-175

LOUIS W. SULLIVAN, M.D., Secretary of the Department of Health & Human Services — DEFENDANT

ORDER

Plaintiff, Georgia Goodin, has filed the pending motion for attorney's fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (d). The Court has reviewed the entire record and finds that the position of the Secretary was not substantially justified. Thus, an award of attorney's fees and costs pursuant to EAJA is not unjust.

Plaintiff's unopposed motion for EAJA fees and costs is granted. Her attorney is awarded fees in the amount of $12,150.00 (121.50 hours X $100.00 an hour), plus costs in the amount of $1,389.12.

IT IS SO ORDERED this 6th day of September, 1991.

/s/ Henry Woods
HENRY WOODS, U. S. District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

GEORGIA GOODIN (SSN: 431-66-5184) PLAINTIFF

V. NO. J-C-88-175

LOUIS W. SULLIVAN, M.D., Secretary of the Department of Health & Human Services DEFENDANT

ORDER

INTRODUCTION. On June 25, 1991, plaintiff, Georgia Goodin, filed a motion for attorney's fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. 2412. The Secretary submitted no response to this motion. On September 9, the Court granted plaintiff's unopposed motion and awarded her attorney his fees and costs. Fourteen days later, the Secretary filed the pending motion to alter the order awarding her attorney his fees and costs. The Court finds, after reviewing the motion and plaintiff's response, that the motion should be, and is, granted. The order granting EAJA fees

and costs is withdrawn. No fees or costs will be awarded.

FACTS. The relevant facts, most of which have been agreed to by the parties, are set out below:

1. In April, 1976, plaintiff filed an application for disability insurance benefits ("benefits") with the Social Security Administration ("SSA"), alleging disability since March, 1970.

2. The SSA denied her application initially and upon reconsideration.

3. Following a subsequent hearing, an administrative law judge denied her application, finding that she was not disabled at any time prior to the September, 1973 expiration of her insured status.

4. Plaintiff sought judicial review of the administrative action by filing a complaint in federal court.

5. In September, 1979, the Court affirmed the Secretary's denial of benefits.

6. The decision of the district court was affirmed on appeal.

7. In 1980, she filed a second application for benefits.

8. The SSA denied this application initially and upon reconsideration.

9. Following another hearing, an administrative law judge denied this application, finding that the prior decision was res judicata as to the existence of a disability on, or before, the day her insured status expired.

10. In May, 1987, plaintiff filed a third application for benefits, again alleging disability since March, 1970.

11. This application was filed after the discovery and removal of a brain tumor found to have been in existence prior to, or at the time of, the expiration of her insured status.

12. The SSA again denied this application initially and upon reconsideration.

13. She requested, but was denied, a hearing on this application.

14. In the opinion of the administrative law judge, the prior decision could not be re-opened because the material facts presented in the third application were the same as those presented in the first application.

15. The Appeals Council denied her request for further review, noting that the additional evidence was immaterial and irrelevant to the matters decided in May, 1977.

16. In July, 1988, plaintiff sought judicial review of the administrative action in federal court.

17. The Court again dismissed her complaint.

18. The Court found that a "final decision" had not been made by the

Secretary, and the Court was therefore without jurisdiction to entertain the complaint.

19. Assuming, alternatively, that a "final decision" had been made, the Court was unable to find that the Secretary, by considering the additional evidence she had submitted, had reviewed the prior application "on the merits."

20. She sought no other judicial review.

21. In March, 1988, after her third application had been denied administratively but before she sought judicial review of the action, plaintiff filed a fourth application for benefits.

22. The SSA apparently denied the application initially and upon reconsideration, and an administrative law judge denied the application without a hearing on the basis of res judicata.

23. The Appeals Council subsequently remanded the application to the

administrative law judge for reconsideration due to changes in the disability law and evidence that she had a slow-growing tumor as of approximately 1970.

24. Her on-going request for benefits was thus re-opened back to the May, 1987 application, i.e., the third application.

25. The administrative law judge again denied the application, finding that plaintiff was not disabled.

26. On May 31, 1991, the Appeals Council reversed the decision of the administrative law judge and awarded her benefits from March, 1970 on the basis of her May, 1987 application.

27. On June 19, 1991, plaintiff filed a motion to dismiss containing the following representations:

> On 5/3/87, plaintiff filed her application for Title II benefits, and on 11/18/88, the Court entered its order denying the claim. However, on a subsequent application filed 3/16/88, the plaintiff

> prevailed and the Appeals Council reversed its previous denial of benefits, finding that plaintiff had been disabled since March of 1970. Thus, the SSA reopened and awarded benefits based on the 5/3/87 application which was the subject of this civil action.
>
> Since the defendant has agreed to pay disability benefits to the plaintiff in this matter based on the 5/3/87 application, the matter should be dismissed.

28. The motion was granted two days later.

29. On June 25, 1991, she filed a motion for attorney's fees and costs pursuant to the EAJA.

30. The motion was granted, and her attorney was awarded a fee in the amount of $12,150.00, plus costs in the amount of $1,389.12.

31. Fourteen days later, the Secretary filed the pending motion to alter the previous order.

ARGUMENTS OF THE PARTIES. In the motion to alter, the Secretary takes the position that plaintiff was not a "prevailing party" for purposes of the

EAJA. The Court quotes liberally from the brief submitted by the Secretary:

> On November 18, 1988, the court determined it had no jurisdiction to review the Secretary's decision not to reopen and dismissed plaintiff's Complaint. Plaintiff received no benefits. Plaintiff took no judicial action on her claim for benefits and did not seek further judicial review on the request for reopening. Thus, plaintiff's district court action on the issue of reopening terminated on November 18, 1988, and her claim for benefits was never before this Court. The EAJA provides that a court "may award reasonable fees and expenses . . . to the prevailing party in any civil action. . . in any court having jurisdiction in such action." See 28 U.S.C. § 2412 (b).
>
> Before a claimant can [become] a "prevailing party," she must obtain those benefits which she sought on the original appeal to the district court. [Citation omitted]. Parties may be considered prevailing if they have succeeded on any significant issue in litigation which achieved some of the benefits the parties sought in bringing suit. [Citation omitted]. Under the EAJA, "benefit" means more than an enhanced legal position because material relief must also be present. [Citation omitted]. Parties are ineligible for attorney fees under the EAJA where no benefits [have] been garnered in the real world, outside the judicial/ administration process. [Citation omitted].

> In the case at hand, plaintiff did not receive benefits based on her only Complaint before this Court, which was filed on July 8, 1988 and dismissed on November 18, 1988 because this Court did not have jurisdiction to consider it. As noted above, plaintiff's Complaint was based on the May 5, 1987 application. Further, it was solely plaintiff's March 16, 1988 application which led to an award of benefits without judicial proceedings. Plaintiff was not awarded benefits based upon her claim which was brought before this Court and dismissed for lack of jurisdiction. No civil action was ever brought which led to an award of benefits. Thus, under the EAJA provisions and relevant caselaw, plaintiff is not a "prevailing party" in a "civil action," and accordingly, is not eligible for attorney fees under the EAJA.

Brief at 4-5.

Plaintiff disagrees. She maintains that the term "prevailing party" should be given a broad interpretation, that being, an interpretation that encompasses any situation in which a claimant successfully obtains a settlement of her claim. By this interpretation, she was a "prevailing party" because the Secretary eventually awarded her benefits. Because the other

requirements of § 2412 (d) (1) (A) were satisfied, she maintains that her attorney was entitled to his fees and costs.

ANALYSIS. Plaintiff represents that an analogous case is Green v. Bowen, 877 F. 2d 204 (2nd Cir. 1989). Accepting, for purposes of this Order, that Green is a correct statement of the law, a three-part inquiry is necessary. The Court must first determine whether plaintiff was a "prevailing party" under § 2412 (d) (1) (A) of the EAJA. See Id. at 206. If she was a "prevailing party," the Court must determine whether the position of the Secretary was "substantially justified." See Id. at 207. If the position of the Secretary was not "substantially justified," the Court must then determine whether the activity in federal court for which she seeks attorney's fees and costs under the EAJA was a "contributing factor" in bringing about the administrative

action which ultimately resulted in an award of benefits. See Id.

For purposes of this Order, the Court finds that plaintiff has satisfied the first two parts of the Green inquiry. She was a "prevailing party," and the position of the Secretary was not "substantially justified." However, for the reasons that follow, she has failed to satisfy the third part of the Green inquiry.

Plaintiff began her attempt to obtain benefits in 1976. The fifteen year process by which she ultimately obtained these benefits took her into federal court on two separate occasions. Her first request for judicial review occurred after the Secretary denied her first application for benefits. The Court upheld the decision of the Secretary, and the Court of Appeals affirmed. Nine years later, plaintiff made her second request for judicial review after the Secretary denied her third application for benefits. The

Court again upheld the decision of the Secretary, and she sought no further judicial review. This brief recitation of the salient facts conclusively demonstrates that plaintiff's two requests for judicial review proved fruitless. Her on-going battle for benefits was not helped in any way by her failed attempts to obtain judicial review. The Court did nothing to cause the Appeals Council to reverse the decision of the administrative law judge and award her benefits from March, 1970. Rather, the Appeals Council apparently recognized that changes had occurred in the disability law and that there was some evidence she had a slow-growing tumor as of approximately 1970. Thus, the activity in federal court for which she seeks attorney's fees and costs under the EAJA was not a "contributing factor" in bring about the administrative action which ultimately resulted in an award of benefits.

CONCLUSION. The motion to alter is granted. With some reluctance,[1] the order granting EAJA fees and costs is withdrawn. No fees or costs will be awarded.

IT IS SO ORDERED this 17th day of January, 1992.

/s/ Henry Woods
HENRY WOODS, U. S. District Judge

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1. The Court is reluctant to withdraw the order for two reasons. First, the explanation given by the Secretary for failing to respond to the motion for EAJA fees and costs is weak. Second, the conduct of plaintiff's attorney is a model of diligent representation.